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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL LANE, Director of the Illinois Department of Corrections, and JAMES THIERET, Warden, Menard Correctional Center,

Petitioners,

vs.

FRED REED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the United States Court of Appeals for the Seventh Circuit erred in granting a writ of habeas corpus for the murder conviction of Beverly Truitt where the state trial court properly instructed the jury as to this offense but improperly instructed the jury as to the murder of Michael Robbins.

2) Whether the United States Court of Appeals for the Seventh Circuit erred in granting a writ of habeas corpus for the murder of Beverly Truitt where respondent failed to allege a due process violation as to this conviction in state court thus precluding habeas corpus review by the federal courts pursuant to *Wainwright v. Sykes*, 433 U.S. 72 (1979).

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In The

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October Term, 1985

MICHAEL LANE, Director of the Illinois Department of Corrections, and JAMES THIERET, Warden, Menard Correctional Center,

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vs.

FRED REED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at *United States ex rel. Reed v. Lane*, 759 F.2d 618 (7th Cir. 1985). A copy of the decision is attached to this petition as Appendix A. The order of the United States District Court for the Northern District of Illinois, Eastern Division is reported at *United States ex rel. Reed v. Lane*, 571 F.Supp. 530 (N.D. Ill. 1983). A copy of the order is attached to this petition as Appendix B.

JURISDICTION

The court of appeals on April 10, 1985, affirmed the district court's grant of respondent's application for a writ of habeas corpus as to the murder convictions, but stayed its issuance pending respondent's serving his sentence on the offense of armed robbery. Petitioner's timely filed petition for rehearing and suggestion for rehearing en banc was denied on August 1, 1985. (Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. State Court Proceedings

Respondent, Fred Reed, was found guilty after a jury trial in the Circuit Court of Cook County, Illinois of the murders of Michael Robbins and Beverly Truitt and the armed robbery of Beverly Truitt. The circuit court sentenced respondent to concurrent terms of imprisonment of not less than 50 years nor more than 100 years for each murder and not less than 20 years nor more than 30 years for armed robbery.

From a judgment of conviction, respondent took a direct appeal to the Illinois Appellate Court, First District. The appellate court affirmed the judgments of conviction. *People v. Reed*, 104 Ill. App. 3d 331, 432 N.E.2d 979 (1st Dist. 1982).

B. Federal Court Proceedings

On June 2, 1983, respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of Illinois, Eastern Division. On July 14, 1983, petitioners filed an answer to the petition for writ of habeas corpus with supporting memorandum of law. The district court on October 3, 1983, granted the petition for writ of habeas corpus and held that petitioners "are ordered to discharge Reed unless the State of Illinois gives him a new trial within a reasonable time." *United States ex rel. Reed v. Lane*, 571 F.Supp. 530, 534 (N.D. Ill. 1983).

Judgment was entered pursuant to Rule 58 of the Federal Rules of Civil Procedure on October 4, 1983. The petitioners on October 11, 1983, filed a motion to alter or amend judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. The motion was denied by the district court on October 31, 1983. Petitioners filed a Notice of Appeal on November 4, 1983.

The United States Court of Appeals for the Seventh Circuit on April 10, 1985, affirmed the district court's "issuance of the writ but stay[ed] it pending Reed's serving of the sentence on the armed robbery charge and 120 days thereafter (for the State to retry him)." *United States ex rel. Reed v. Lane*, 759 F.2d 618 (7th Cir. 1985). Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied by the court on August 1, 1985.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN GRANTING A WRIT OF HABEAS CORPUS FOR THE MURDER CONVICTION OF BEVERLY TRUITT WHERE THE STATE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THIS OFFENSE BUT IMPROPERLY INSTRUCTED THE JURY AS TO THE MURDER OF MICHAEL ROBBINS.

Lonnie Hall knocked on respondent's apartment door, showed him a gun, and told respondent he wanted respondent to assist him to enter Michael Robbins' apartment. Subsequently, the respondent and Hall went downstairs to Robbins' apartment and the respondent knocked on the door and identified himself. When Robbins opened the door, Lonnie Hall forced his way into the apartment and ordered Robbins to lie on the bed. Hall then told respondent to tie up Robbins and the respondent complied. Hall placed a pillow over Robbins' head and fired two shots. As Hall and respondent were leaving Robbins' apartment, Beverly Truitt, a neighbor from across the hall, opened her apartment door. Hall pushed her back into her apartment and as respondent waited in the hallway, he heard two shots. Hall then came out of the apartment with jewelry. Respondent asked Hall for some of the jewelry and was given three of four rings, a bracelet, and a necklace. As a result of these facts, respondent was convicted of the murder of Michael Robbins and the murder and armed robbery of Beverly Truitt.

The constitutional violation as alleged in the petition for writ of habeas corpus was based on the state trial court's

failure to instruct the jury on the defense of compulsion as to the murder of Robbins. No constitutional challenge was made as to the convictions for the murder or armed robbery of Truitt. However, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision granting habeas corpus relief to respondent for the convictions of the murders of Michael Robbins and Beverly Truitt. The decision of the court to grant habeas corpus relief for respondent's conviction for the murder of Beverly Truitt is contrary to decisions of courts of appeals from other circuits. Relief in the form of a writ of habeas corpus which requires the State of Illinois to release respondent unless he is retried for the murder of Beverly Truitt is simply not required.

The fundamental flaw in the lower court's decision is that the court began its analysis of the issues presented with an assertion that is factually inaccurate: "At trial [respondent's] defense was that he was coerced into participating in the crimes." *United States ex rel. Reed v. Lane*, 759 F.2d 618, 620 (7th Cir. 1985). This statement is erroneous in that respondent never asserted as a defense in the state trial court that he was compelled to commit the murder and armed robbery of Beverly Truitt. Respondent in state court sought to advance the defense that he was compelled to assist Lonnie Hall only with respect to the charge of murder for the death of Michael Robbins. The defense as to the murder and armed robbery of Beverly Truitt was that respondent was not accountable under Illinois law for Hall's conduct. This defense with respect to the murder and armed robbery of Truitt is made absolutely clear by defense counsel's argument in support of his motion for a directed verdict after the close of the State's case-in-chief:

> Under those circumstances, I don't believe that the State can argue successfully as a matter of law, not simply as a matter of fact, that Mr. Reed is accountable in anyway for anything that—that happened to Miss Truitt in her own apartment. . . .

(Tr. 495) Moreover, defense counsel's position during the jury instruction conference further demonstrates that a compulsion defense was not sought as to the Truitt offenses:

> Now, if in determining whether or not Mr. Reed will be convicted of one or both of the homicides, the Jury is certainly entitled to an instruction for the second—second murder, that being the death of Beverly Truitt, then in fact they are entitled to an instruction as to the compulsion in regards to the death of Michael Robbins.

(Tr. 568) Insofar as respondent failed to claim that the jury was not properly instructed as to the murder of Truitt, habeas corpus relief as to this conviction cannot be granted. As Judge Coffey so accurately noted in his dissent from the decision of the lower court, "Reed's conviction should be reversed only as to the murder of Robbins. Reed only complains that he was denied his compulsion defense as to the murder of Robbins, he asserted no compulsion defense as to the murder of Truitt." *United States ex rel. Reed v. Lane*, 759 F.2d 618, 625 n.1 (7th Cir. 1985).

There is a clear consensus that relief in the form of a retrial is only necessary on a count of an indictment upon which the jury was not properly instructed. In *United States v. Leon*, 679 F.2d 534 (5th Cir. 1982), defendant argued that he could not be convicted of count 5 of the indictment since the trial judge failed to instruct the jury as to that count. The court reversed the conviction as to count 5 and held that the judge must instruct the jury

on all aspects of a case in order for the jury to reach a fair and proper verdict. Although the court reversed the conviction on count 5 of the indictment, the court remanded the case for a new trial on that count alone. *Id.* at 541. As to all other counts, the judgment was affirmed.

Similarly, in *United States v. Brown*, 692 F.2d 345 (5th Cir. 1982), defendant was convicted on five counts of a multicount indictment. On appeal defendant contended that the trial court committed plain error in failing to instruct the jury on each of the essential elements of the substantive offense in count eight. Although the court accepted the defendant's argument, only the conviction on count eight of the indictment was reversed and remanded for a new trial. The court affirmed the four remaining convictions. *Id.* at 348.

Finally, in *United States v. DeLuca*, 692 F.2d 1277 (9th Cir. 1982), the court found that the trial court had improperly instructed the jury on count 1 of the indictment. The court reversed the conviction on count 1, but affirmed the convictions on the remaining 19 counts.

Based upon these decisions, the lower court's decision which granted respondent relief as to a murder conviction creates a conflict among the circuits and is not in line with established precedent.

II.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN GRANTING A WRIT OF HABEAS CORPUS FOR THE MURDER OF BEVERLY TRUITT WHERE RESPONDENT FAILED TO ALLEGE A DUE PROCESS VIOLATION AS TO THIS CONVICTION IN STATE COURT THUS PRECLUDING HABEAS REVIEW BY THE FEDERAL COURTS PURSUANT TO *WAINWRIGHT v. SYKES*, 433 U.S. 72 (1979).

This Court has limited the availability of federal habeas corpus relief by holding that "contentions of federal law which were not resolved on the merits in the state proceeding due to [petitioner's] failure to raise item there as required by state procedure" precludes the review in a habeas petition. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1979). Failing to follow state procedure produces an independent state ground precluding federal review absent a showing of cause and prejudice by the petitioner. Post-*Wainwright* decisional law emphasizes that the waiver doctrine is designed to afford state courts an adequate opportunity to rectify any constitutional defects in their criminal proceedings. *Engle v. Isaac*, 456 U.S. 107 (1982).

In the instant case not only did respondent fail to allege a due process violation with respect to the murder conviction of Beverly Truitt in the district court, but the claim was not advanced in the Illinois appellate court on direct appeal in state court. An examination of the Brief and Argument filed in the Illinois Appellate Court, First District, reveals that respondent failed to advance a due process argument with respect to the murder of Truitt. Respondent made the following argument in the Illinois appellate court with respect to the trial court's failure to instruct the jury on the defense of compulsion:

The trial court apparently refused the instruction because two murders were committed. Ill. Rev. Stat., Ch. 38, § 7-11(a) states:

> A person is not guilty of an offense, other than an offense punishable by death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or great bodily harm, if he reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct.
>
> Thus, the defense of compulsion is available in all offenses other than those punishable by death. A murder punishable by death, under the death penalty statute in effect at the time of the crime, is one in which at least one of seven aggravating factors is found to be present, as set forth in Ill. Rev. Stat., Ch. 38, § 9-1(b).
>
> None of the aggravating factors enumerated in §9-1(b) was present in the murder of Michael Robbins, *which is the murder in which Reed claims he was compelled to assist.* Thus, the murder of Michael Robbins was not an offense punishable by death, and therefore Reed was entitled to have the jury instructed on the defense of compulsion.

(R. 14, Respondents' Exhibit 1 at 28) (emphasis added). Indeed, respondent on direct appeal fully recognized the defense presented at trial by noting: "The defense argued that the jury might find Reed accountable for the death of Truitt, and was entitled to an instruction on compulsion as to the death of Robbins." (R. 14, Respondents' Exhibit 1 at 25) With respondent's issue thus framed, the appellate court stated the issue it was to decide:

> The second issue raised on appeal is whether the trial court erred in refusing the compulsion instruction tendered by the defense. The defendant contends that the instruction should have been given with

> regard to the Robbins' murder because the defendant's statement, which was admitted into evidence, disclosed that the defendant participated in that murder under threat that Lonnie Hall would kill him if he did not go with Hall to Robbins' apartment.

People v. Robinson, 104 Ill. App. 3d 331, 337, 432 N.E.2d 979, 984 (1st Dist. 1982).

Insofar as the compulsion defense argument with respect to the conviction for the murder of Truitt was not advanced in state court on direct appeal, it could not have been advanced in the district court under this Court's decision in *Wainwright v. Sykes*, 433 U.S. 72 (1979). Consequently, the lower court created a claim out of whole cloth to reach the result of granting habeas corpus relief with respect to the murder conviction for the death of Beverly Truitt. Petitioner, consequently requests this Court to grant the Petition for Writ of Certiorari and reverse the judgment of the lower court. Summary reversal is most appropriate in this case.

CONCLUSION

For the above-advanced reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-2972

UNITED STATES OF AMERICA ex rel.
FRED REED,

Petitioner-Appellee,

v.

MICHAEL LANE AND JAMES GREER,

Respondents-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 83 C 3622—**Milton I. Shadur**, *Judge.*

ARGUED JUNE 1, 1984—DECIDED APRIL 10, 1985

Before CUMMINGS, *Chief Judge*, COFFEY, *Circuit Judge*, and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* The State of Illinois appeals the District Court's grant of a Writ of Habeas Corpus to Fred Reed. The petitioner had been serving two concurrent prison terms of fifty to one hundred years for two murders with an additional concurrent term of twenty to thirty years for armed robbery. The constitutional violation found by the District Court involved the state trial judge's failure to give a jury instruction on the compulsion defense. The trial judge declined to give the instruction based upon his interpretation of Illinois statutory law which provided that compulsion is not a

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

defense in a capital case. This ruling was affirmed by the Appellate Court of Illinois, *People* v. *Reed*, 432 N.E.2d 979 (Ill. App. 1982). The District Court, however, held that under that interpretation, the Illinois statute failed to put the petitioner on notice as to the requirements of the criminal law and therefore violated his due process rights. Based on that analysis, the District Judge granted the writ requiring Reed's discharge unless he was properly retried within 120 days. The state appeals that decision raising numerous arguments.

At the state court trial the bulk of the testimony regarding the actual incident came from statements of Reed. Those statements presented the following scenario. Michael Robbins, one of the murder victims, became involved in a heroin trafficking territorial dispute with another drug pusher named "Big 50". Since an amicable resolution was impossible, Big 50 determined that Robbins would be killed.[1] Reed, who lived in the same apartment building as Robbins, had lent him a 32 automatic gun for protection.[2] On August 28, 1977, Lonnie Hall entered Reed's apartment with a gun and told him he wanted to use Reed to get into Robbins' apartment. Hall apparently believed Robbins would open the door for Reed since he trusted him. He told Reed if he didn't cooperate he "would come up dead." They went to Robbins' apartment, Reed knocked and identified himself, and Robbins opened the door. Hall then forced his way into the apartment and ordered Reed to tie up Robbins. Then Hall put a pillow over Robbins' head and shot him twice.

---

[1] This was corroborated by the testimony of Bobbie Taboda, the manager of the apartment building in which Robbins and Reed lived. Big 50 told her that she wouldn't have to worry about Robbins any more because he would be "taken care of."

[2] This was corroborated by Denise Johns, the sister of the other murder victim, Beverly Truitt.

Hall and Reed then left Robbins' apartment. As they did so, Robbins' girl friend, Beverly Truitt, opened her door and asked what happened. Hall told Reed to stay in the hall and then he pushed Truitt back into her apartment. He then shot her twice and returned with a handful of jewelry. At Reed's request, Hall gave him some of the jewelry but told him if he revealed what had happened he would kill him.

Thereafter, Reed was indicted for two counts of murder and one count of armed robbery. At trial his defense was that he was coerced into participating in the crimes. However, after all the evidence was presented, the trial judge refused to instruct the jury on the coercion defense, concluding that under the applicable Illinois statutes coercion was not a defense in this case. Thereafter, the jury found Reed guilty of all three counts.

The Appellate Court of Illinois upheld the trial court's decision and presented the reasoning for it. The compulsion defense is codified in Ill. Rev. Stat. ch. 38, § 7-11(a):

> A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or great bodily harm, if he reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct.

The court determined that Reed had committed a capital offense because he had been involved in two murders. This conclusion was premised on Section 9-1(b)(3) of Illinois' death penalty statute:

> A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: . . .

> 3. the defendant has been convicted of murdering two or more individuals under Subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts . . .

The court relied heavily on *People* v. *Gleckler*, 411 N.E.2d 849 (Ill. 1980). In that case the defendant had shot two teenagers in the back of the head with a shotgun while they kneeled on the side of the road. He presented a coercion defense at the trial but the judge refused to instruct the jury as to that defense. This ruling was upheld by the Illinois Supreme Court. In its opinion the court analyzed the legislative intent behind the compulsion defense and the capital crime statutes and concluded that the compulsion defense was not available to any murder charge. In response to defendant's argument that the statutes did not put him on notice that compulsion was not a defense, the court admitted that it was departing from the precise terms of the statute but justified its action stating:

> The enlargement of the literal meaning of a criminal statute by a State Court of last resort is permissible, at least where such an enlargement conforms with legislative intent. 411 N.E.2d at 856.

However, realizing the due process ramifications of its decision, the Supreme Court determined that it could only implement its decision prospectively. Nonetheless, since defendant's double murder presented an aggravating factor under the death penalty statute, the court determined that Gleckler had adequate notice that compulsion was not a defense to his crimes. The court stated, however:

> A distinguishable situation would be presented here on due process grounds if no aggravating factor under section 9-1(b) were alleged, *Ibid.*

Following *Gleckler*, the Appellate Court in *People* v. *Reed* noted that since the defendant was being charged with two murders, an aggravating factor as defined in § 9-1(b)(3) was present. Therefore, it concluded that each murder was a capital crime and the coercion defense was unavailable as to each of them.

In ruling on the habeas corpus petition, the District Judge initially noted the necessary legal fiction that a person faced with a decision regarding potentially criminal conduct is aware of the provisions of criminal law. Thereafter, the District Judge stated:

> In terms of that necessary fiction, had Reed looked at the statute when forced to decide what action to take in conjunction with Robbins' murder, he would have known from the plain statutory language the compulsion defense was available to him. Under that defense Reed could yield to Hall's death threat without putting his own life in jeopardy (via a potential death sentence) by so yielding. That was the legal matrix in which Reed was entitled to make his decision about which action to take. What was surely not obvious from the face of the statute and then-existing case law was that a *later* event—Hall's gratuitous murder of Truitt—would deprive Reed of the compulsion defense on the theory that *as a whole* two or more murders are punishable by death. [Footnotes deleted.]

Based on this reasoning, the District Judge concluded that Reed's due process rights were violated and that the issuance of the writ was required. Thereafter, the state moved for clarification to determine whether the court intended to set aside all three of Reed's convictions. The District Judge denied the motion and indicated that he

intended the petitioner to be discharged unless he was granted a retrial as to all three counts. This appeal was then filed.

Appellant claims that there was insufficient evidence of compulsion presented by the defendant to justify the giving of the jury instruction. This was not the rationale of the trial court nor was it suggested by the Illinois Appellate Court as an alternative basis for its decision. Furthermore, the District Judge was not persuaded by this argument. Under Illinois law compulsion is an affirmative defense but the defendant need only produce "some evidence thereon" and then the burden shifts to the state to disprove the defense beyond a reasonable doubt, *see Gleckler, supra*, 411 N.E.2d at 853. Reed's testimony as to Hall's death threat is certainly evidence of compulsion and Hall's brandishing of a pistol constitutes a reasonable basis for fear of death or great bodily harm. This is further supported by Reed's awareness that Big 50 had ordered Robbins' death. The fact that Reed had lent Robbins a gun for protection also suggests that he had not intended to participate in the killing but in fact was opposed to the idea. Therefore, we conclude that under Illinois law Robbins produced sufficient evidence of compulsion to warrant a jury instruction.

The appellant's constitutional arguments are both based on a misconception of the District Judge's decision. It argues that the interpretation of state statutes is purely within the domain of state courts unless a violation of fundamental constitutional rights is involved. Furthermore, it claims;

> The district court improperly granted petitioner habeas corpus relief by rejecting the construction placed on section 7-11(a) by the Illinois courts. Appellant's brief p. 15.

The requirement that criminal statutes must give fair warning of the conduct proscribed implicates "the first essential of due process," *see Connally* v. *General Construc-*

tion Co., 269 U.S. 385, 391 (1926), and is a fundamental right, *see Marks* v. *United States*, 430 U.S. 188, 191 (1977). More importantly, the District Judge did not invalidate or set aside the state court's interpretation of the statute. He simply ruled that it could not be applied retroactively to this defendant's conduct. This is the proper remedy and has been previously utilized in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). In that case a South Carolina criminal statute prohibited "entry on lands of another after notice prohibiting same." The petitioners were convicted under that statute even though they had no notice prior to entering the property that their presence was prohibited. The Supreme Court of South Carolina upheld the convictions construing the statute to include situations where a person remained on the premises after receiving notice to leave. The United States Supreme Court, however, determined that the convictions were invalid because they violated the due process clause of the Constitution. The court relied on the *Connally* line of cases although noting that the case before it was somewhat distinguishable:

> It is true that in the Connally and Lanzetta cases, and in other typical applications of the principle, the uncertainty as to the statute's prohibition resulted from vague or overbroad language in the statute itself, and the Court concluded that the statute was "void for vagueness." The instant case seems distinguishable, since on its face the language of § 16-386 of the South Carolina Code was admirably narrow and precise; . . . The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. 378 U.S. at 351-352.

The remedy applied was to set aside the convictions but the court specifically noted that the South Carolina Su-

preme Court's construction of the statute would be valid prospectively, 378 U.S. at 362. That is the remedy applied by the District Judge in this case, although here a retrial was feasible since the situation involved the omission of a defense rather than the creation of an offense.

Appellants also argue that the state court's omission of a compulsion instruction does not rise to a constitutional violation because it did not result in a fundamental miscarriage of justice, *citing, inter alia, United States ex rel. Peery* v. *Sielaff*, 615 F.2d 402 (7th Cir. 1979). However, the *Peery* line of cases involve Sixth Amendment violations which occur when

> [T]he trial judge evaluates or screens the evidence supporting a proposed defense and upon such evaluation declines to charge on that defense, [as a result] he dilutes the defendant's jury trial by removing the issue from the jury's consideration, *Strauss* v. *United States*, 376 F.2d 416, 419 (5th Cir. 1967), quoted in *Peery, supra*, 615 F.2d at 403-404.

The case *sub judice* does not arise under the Sixth Amendment but rather under the due process clause of the Fifth Amendment. Therefore, the standard of review utilized in the *Peery* line of cases is not applicable here. Rather, the relevant standard is whether the jury instructions accurately reflected the law as it appeared at the time of the alleged criminal conduct, *see Marks* v. *United States, supra; Rabe* v. *Washington*, 405 U.S. 313 (1972). Therefore, the District Court was correct in concluding that the appropriate time frame for determining the criminal law applicable to Reed's case was at the time of Hall's threat. This is a situation where "a federal right turns upon the status of state law as of a given moment in the past—or, more exactly, the appearance to the individual of the status of state law as of that moment." *Amsterdam*, Note 109, U.Pa.L.Rev. 67, 74, n. 34 quoted in *Bouie*, 378 U.S. at 354.

The District Court's holding has a very limited scope. Under *Gleckler*, decided in 1980, compulsion is no longer a defense to any murder charge in Illinois. That decision has not been challenged here and it remains valid for prospective application. However, under the Illinois Supreme Court's own reasoning, that principle cannot be applied to Reed's actions which occurred in 1977. At that time there had been no judicial pronouncement regarding the interplay between the compulsion defense statute and the death penalty statute. A reading of those statutes in 1977 would have revealed that compulsion was not a defense to a murder charge if "the defendant has been convicted of murdering two or more individuals." Such a reading would not have informed Reed that he could not legally yield to the death threat of Hall. Nor would a fair reading of those statutes indicate that the subsequent act of Hall murdering Truitt, an act described by the Appellate Court of Illinois as "spontaneous," could deprive him of the compulsion defense as to the first murder.

As to Truitt's murder, the Appellate Court of Illinois found Reed to be accountable under the following reasoning:

> Accountability for murder can be established by proof that before or during the commission of that offense, with the intent to promote or facilitate it, the defendant aided and abetted or attempted to aid and abet in the murder.
>
> * * *
>
> That the defendant was accountable for the Robbins' murder is not disputed. We believe that there also was sufficient evidence to find the defendant accountable for Truitt's murder. While it appears that Truitt's murder was a spontaneous reaction by Hall to Truitt's appearance after Robbins' murder, this fact is not a defense when the evidence indicates involvement by the defendant in that spontaneous act. We believe the defendant aided and abetted in

> Truitt's murder because he was present at the scene of the crime, having remained outside her apartment, and did not oppose or disapprove of Hall's actions. [Citations omitted.] 432 N.E.2d at 984-985.

However, Reed's statement indicated that Hall, who was then armed with two guns, told him to stay there. Thus, an issue of fact exists regarding whether his presence, which was the basis for his accountability, was the result of compulsion. If Reed were permitted to raise the compulsion defense as to the first murder and were to be successful, his involvement in the second murder could not be a capital crime. Therefore, he would be able to raise the compulsion defense as to it. Therefore, we find that the second murder charge must also be retried.

With respect to the armed robbery charge,[3] however, Reed's accountability is also premised on his voluntary involvement in the asportation element of the crime. Reed admitted this participation and it does not appear that the compulsion defense could be raised to it. Therefore, we conclude that a retrial of the armed robbery charge is not necessary.

Accordingly, we affirm the District Court's issuance of the writ but stay it pending Reed's serving of the sentence on the armed robbery charge and 120 days thereafter (for the State to retry him).

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[3] It is questionable whether an armed robbery was actually committed since this could be a case of either larceny or burglary. The murder of Truitt clearly occurred first and the taking of the jewelry, in which Reed participated, occurred thereafter. Therefore, the crime was either larceny or burglary. However, since the Appellate Court of Illinois has held it to be armed robbery, we are bound by its decision.

COFFEY, *Circuit Judge*, dissenting. The issue as framed by the majority and the district court in this case is whether the petitioner, Fred Reed, had adequate notice that the compulsion defense would not be available to him at trial when he was allegedly forced to participate in the murder of Robbins. Despite the majority's well-written opinion to the contrary, I believe the petitioner had adequate notice that the compulsion defense would not be available to him at trial because of his participation in the second murder involving the witness Truitt. Thus, I respectfully dissent.

At the time the crimes in the present case were committed, August 1977, Illinois law provided that the compulsion defense was available unless the offense charged was punishable by death. Ill. Rev. Stat. ch. 38 § 7-11(a). According to the Illinois law at the time, a person could be punished by death if he was convicted of murdering two or more individuals. Ill. Rev. Stat. ch. 38, § 9-1(b)(3). The majority correctly notes that a person must have adequate notice of the law prohibiting certain conduct in order for that person to be charged with a criminal violation. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964). When Reed participated in the Robbins' murder, arguably he did not have notice that if charged with the murder he would be unable to raise the compulsion defense at trial. The record reveals, however, that Reed participated in a second murder, involving the witness Truitt. The Illinois Appellate Court found that Hall pushed Truitt into her apartment and told Reed to wait in the hallway. Reed did not attempt to flee or get help; rather, he waited for Hall, heard the shots, and when Hall reappeared asked him for a share of the jewelry taken from Truitt. The Illinois Appellate Court ruled that these facts were sufficient, in and of themselves, to support Reed's conviction for the first-degree murder of Truitt under the accountability theory. *People v. Reed*, 104 Ill.App.3d 331, 339, 432 N.E.2d 979, 985 (1982).

For purposes of Ill. Rev. Stat. ch. 38, § 9-1(b)(3), I believe Reed had sufficient notice that his participation in the second murder would strip him of his compulsion defense for both murders. A literal reading of § 9-1(b)(3) reveals that this statute does not require contemporaneous acts; rather, the acts may be punishable by death if they "occurred as a result of the same act or of several related or unrelated acts . . . ." Thus, although the compulsion defense may have been initially available for the murder of Robbins, in my opinion Reed's subsequent participation in the second murder stripped him of any right he may have had to assert the compulsion defense at trial.

Clearly, Reed's guilt for the second murder was a real possibility under an accountability theory and the relevant Illinois statutes provided adequate notice to Reed that participation in the second murder would cause the compulsion defense to be forfeited in its entirety. Thus, I believe that when Reed made his choice to remain and support Hall during the Truitt murder, he forfeited his compulsion defense. Accordingly, I respectfully dissent.[1]

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[1] Even if one would disagree with the conclusion that there was adequate notice in this case, Reed's conviction should be reversed only as to the murder of Robbins. Reed only complains that he was denied his compulsion defense as to the murder of Robbins; he asserted no compulsion defense as to the murder of Truitt. The Illinois Appellate Court has made a sufficient finding that Reed's acts in the hallway during the murder of Truitt and his subsequent request for part of Truitt's jewelry constituted enough evidence to sustain the conviction for the second offense. I do not agree with the district court that had the compulsion defense been available for Robbins' murder, that this would have necessarily impacted upon Reed's conviction for the murder of Truitt. As noted by the Illinois Appellate Court,

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[1] *continued*

there were sufficient facts involving the murder of Truitt to separately sustain the conviction for the murder of Truitt under the accountability theory.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. FRED REED,

Petitioner,

No. 83 C 3622 v.

MICHAEL LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS and JAMES GREER, WARDEN, MENARD CORRECTIONAL CENTER,

Respondents.

MEMORANDUM OPINION AND ORDER

Fred Reed ("Reed") has petitioned for a writ of habeas corpus pursuant to 28 U.S.C. §2254.[1] For the reasons stated in this memorandum opinion and order, Reed's petition is granted.

Facts[2]

As the result of his participation in two killings and a related robbery, Reed was convicted of two counts of

[1] Reed has been represented from the outset by the State Appellate Defender, whose well-presented supporting and reply memoranda have been sandwiched around the Attorney General's memorandum in support of his answer to the petition. This Court has also been favored with the brief filed by the Appellate Defender on Reed's behalf in his state court appeals.

[2] Except for the critical facts as to the alleged threat under which Reed acted (taken from the trial transcript), this is essentially a bobtailed version of the facts summarized by the Illinois Appellate

(Footnote continued on following page)

murder and one of armed robbery. All his available state court remedies have been exhausted, and he is now serving concurrent prison terms of 50 to 100 years for each murder and 20 to 30 years for armed robbery.

According to the trial testimony one of the murder victims, Michael Robbins ("Robbins"), was killed over a narcotics trafficking territorial dispute involving Robbins, Lonnie Hall ("Hall") and others. About 10:30 p.m. August 28, 1977 Hall came into Reed's apartment with a gun and told Reed he wanted to use Reed to gain entry into Robbins' apartment (Robbins lived in the courtway right next to Reed's apartment). Hall threatened Reed, telling him to accompany Hall to Robbins' place or Reed "would come up dead." They went to Robbins' apartment, Reed knocked and identified himself, and Robbins opened the door. Hall forced his way into the apartment, ordered Robbins to lie down on the bed and told Reed to tie him up. Reed tied Robbins' legs and Hall tied his hands. Hall then covered Robbins' head with a pillow and shot him twice.

As Hall and Reed left Robbins' apartment Beverly Truitt ("Truitt") opened her door and asked what happened. Hall pushed her back into her apartment and shot her twice. When Hall came out of her apartment he had some jewelry. At Reed's request Hall gave him three or four rings, a bracelet and necklace.

Reed's Constitutional Claim

Reed claims constitutional error in the trial court's refusal to give a tendered jury instruction on the affirmative defense of compulsion. Under Ill. Rev. Stat. ch. 38, §7-11(a) ("Section 7-11(a)"):

> A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct

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[2] *continued*
Court in *People v. Reed*, 104 Ill.App.3d 331, 432 N.E.2d 979 (1st Dist. 1982). Leave to appeal was denied by the Illinois Supreme Court April 12, 1982.

> which he performs under the compulsion of threat or menace of the imminent infliction of death or great bodily harm, if he reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct.

Section 7-11(a) and its permissible reading are the focus of this action.

In respondents; answer here the State maintains (as it did in the state courts) Reed was not entitled to the compulsion instruction because he committed "an offense punishable with death."[3] Here as in the state courts, Reed counters such a construction of Section 7-11(a) was constitutionally impermissible, because Reed was compelled to help commit Robbins' murder at a time when Reed had not yet come within the statutory "punishable with death" exception.

In affirming Reed's conviction, the Illinois Appellate Court rejected his proposed reading of Section 7-11(a). 104 Ill.App.3d at 337-39, 432 N.E.2d at 984-85. This Court is bound by that construction in state law terms. *Israel v. Odom*, 521 F.2d 1370, 1376 (7th Cir. 1975); *United States ex rel. Hanrahan v. Bosse*, 547 F.Supp. 718, 720-21 (N.D. Ill. 1982).

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[3] In relevant part the Illinois death penalty statute, Ill. Rev. Stat. ch. 38, §9-1(b)(3) ("Section 9-1(b)(3)"), provides:

> A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: . . .
>
> 3. the defendant has been convicted of murdering two or more individuals under Subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts. . . .

At this point, then, the question is whether that binding construction of Section 7-11(a) denied Reed due process under the Fourteenth Amendment. Reed contends:

> 1. At the time he admittedly participated in Robbins' murder, Reed had committed no prior murder. Therefore the Robbins murder could not have involved the quality of intent or conduct necessary for sentencing Reed to death under Section 9-1(b)(3).
>
> 2. At the time of the Robbins murder Reed could not reasonably have anticipated Hall's later murder of Truitt. That later murder cannot be the retroactive predicate for making Reed's involvement in the earlier offense punishable by death.

Essentially Reed relies on the principle that due process requires a person to be fairly apprised of criminal consequences *at the time he acts*—in this case at the time he reacted to the compulsion he claims Hall visited upon him immediately preceding Robbins' murder. If such notice is not fairly given by a statute, that statute is deemed unconstitutionally vague under the standard of *United States v. Harriss*, 347 U.S. 612, 617 (1954):

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Of course every such argument relies on a fiction: the notion that a person bent on criminal activity is indeed aware of what the law provides, as though the potential murderer carries a copy of the Illinois Criminal Code with him (or has it committed to memory). But it is a necessary fiction if the concept of *mens rea* is not to be subverted.[4]

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[4] This case is perhaps not quite like those in which (say) vague vagrancy statutes or ordinances are invalidated on the ground no

(Footnote continued on following page)

This Court then must look at what Reed was fairly apprised of at the time he was confronted with the decision of how to act in the face of Hall's menace to his own life.[5]

In terms of that necessary fiction, had Reed looked at the statute when forced to decide what action to take in conjunction with Robbins' murder, he would have known from the plain statutory language the compulsion defense was available to him. Under that defense Reed could yield to Hall's death threat without putting his own life in jeopardy (via a potential death sentence) by so yielding.[6] That was the legal matrix in which Reed was entitled to make his decision about what action to take. What was surely not obvious from the face of the statute and then-existing case law[7] was that a *later* event—Hall's

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[4] *continued*
reasonable person could know the conduct was criminal at all. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972). After all, everyone knows participating in a killing is in all likelihood a criminal act (*malum in se* rather than *malum prohibitum*). But on reflection the parallel is not so farfetched, for it is not really so obvious that participating in a killing while in fear for your own life is necessarily criminal.

[5] This Court of course makes no factual judgment as to the claimed threat to Reed's life, for this Court is not the finder of fact. Rather the question is whether the *jury* should have been told that acting under such threat—if it believed the evidence—would render Reed not guilty.

[6] In the course of deciding the legislative intent underlying Section 7-11(a), *People v. Gleckler*, 82 Ill.2d 145, 160, 411 N.E.2d 849, 856 (1980) twice essentially acknowledged the statute's literal meaning was that indicated in the text of this opinion. For that reason *Gleckler* limited its elimination of the compulsion defense for *all* murder prosecutions to apply only *prospectively*. Those factors provide an effective confirmation of the fundamental unfairness of saddling Reed with such a skewed and forced reading of the statute.

[7] *Gleckler's* prospective application further narrows the likelihood the present decision (with its unusual facts) will have any meaningful effect on any other cases.

gratuitous murder of Truitt—would deprive Reed of the compulsion defense on the theory that *as a whole* two or more murders are punishable by death.

Now the Illinois Appellate Court has taught Section 7-11(a) must be read that latter way. That gloss on the statute binds this Court as a matter of statutory construction. It does not however bind this Court as to the constitutional effect of that construction. Under the standard enunciated in *United States v. Batchelder*, 442 U.S. 114, 123 (1978), the language of the Illinois statute—as contrasted with its post-hoc interpretation by the Illinois courts—did not "state with sufficient clarity the consequences of violating a given criminal statute." Accordingly this Court holds Section 7-11(a), with the patina added by the Illinois courts, is unconstitutionally vague in due process terms as to Reed.[8]

That due process deprivation impacted on Reed by the trial court's refusal to give the requested instruction as to compulsion (an instruction that would have conformed to the statute's natural meaning without the constitutionally flawed reading). In an effort to avoid that conclusion, respondents have advanced two further arguments:

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[8] This ruling should be distinguished from a holding that Reed was constitutionally entitled to a defense that he had acted under compulsion. This Court is not suggesting the Illinois Supreme Court's decision in *Gleckler* (see n.6), making that defense unavailable to any murderer, was itself unconstitutional (or that a like action by the Illinois General Assembly would be constitutionally suspect). Nor does this Court find Reed to have been denied equal protection simply because all other one-time murderers were accorded a compulsion defense under Illinois law, for the record is devoid of any suggestion the State was motivated by any discriminatory animus toward Reed. Rather the constitutional problem is that the reasonable person in Reed's position could not fairly have known, at the time he was called upon to choose a course of action in response to a death threat (the making of which must be accepted for current purposes), that Sections 7-11(a) and 9-1(b)(3) would be read in the tricky, mirrored-back way that eliminated the compulsion defense retrospectively.

1. There is insufficient evidence of compulsion in the record to warrant an instruction on the issue.

2. Even were that not so, failure to give the instruction did not result in a "fundamental miscarriage of justice."

On the first issue, the "come up dead" testimony was plainly enough on its own to raise the compulsion defense. Once the issue was raised by the evidence, the state court was obligated to instruct the jury on the affirmative defense of compulsion. *People v. Wallace*, 100 Ill.App.3d 424, 430, 426 N.E.2d 1017, 1023 (1st Dist. 1981).[9]

As for respondents' second argument, it cannot be blinked that the jury's unawareness of a compulsion defense subjected Reed to a conviction of Robbins' murder that would not have occurred had the jury credited and given full effect to the "come up dead" testimony. In conjunction with the Truitt conviction,[10] Reed was thus exposed to a potential death penalty—a result that would not have obtained on a conviction as to Truitt alone.

Such "risk enhancement" is strongly redolent of the situation dealt with in *Beck v. Alabama*, 447 U.S. 625

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[9] It will not do for respondents to argue (Mem. 9-10) their own inferences about the reality of Hall's threat. They are not the triers of fact any more than this Court. For aught that appears the uninstructed jury could reasonably have believed the story about Hall's threat, believed Reed was acting in fear of "death or great bodily harm," yet felt that fear still could not justify participation in a callous murder. Such a frame of mind on the part of the jury would have resulted in the guilty verdict it returned. It is plain the refused compulsion instruction *could* reasonably have tipped the scales for acquittal. *Wallace* itself teaches "that very slight evidence upon a given theory of the case will justify the giving of an instruction."

[10] Reed's conviction of this second murder was also affirmed by the Illinois Appellate Court, though a reading of its opinion leaves the feeling it was Reed's unfeeling sharing in the fruits of Hall's wanton killing of Truitt, more than any involvement in the offense itself, that contributed to that result.

(1980), where failure to give an instruction on a lesser-included offense enhanced the defendant's risk of being convicted of a capital offense. What the Court said in *Beck*—the principle that prompted its decision—applies with equal force here (*id.* at 637-38, footnotes omitted):

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:
>
> > "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-358 (opinion of Stevens, J.).
>
> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included

> offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

That enhancement of risk—for Reed was in fact potentially subjected to a death sentence, though the trial court's ultimate decision was to impose a 50- to 100- year term—effectively distinguishes Reed's situation from the line of cases applying a more stringent standard to the usual erroneous jury instruction or the usual erroneously omitted jury instruction.[11] See the discussion in *Nichols v. Gagnon*, 710 F.2d 1267, 1269-72 (7th Cir. 1983). Indeed, under the circumstances of this case, the omission of the compulsion instruction satisfied that more stringent test of "fundamental miscarriage of justice" announced in such cases as *Nichols*.

Conclusion

Reed's petition for writ of habeas corpus is granted. Respondents are ordered to discharge Reed unless the State of Illinois gives him a new trial within a reasonable time (which, absent a showing by respondents, shall be conclusively deemed to require retrial within 120 days).

/s/ Milton I. Shadur
United States District Judge

Date: October 3, 1983

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[11] It is a familiar truism that much of our criminal constitutional law is generated by cases involving (perhaps an understatement) unsavory people who have committed abhorrent offenses. That fact, perhaps coupled with the desire (even subconsciously) not to be "soft on crime," may largely contribute to the current tendency to expand notions of "harmless error." But what *Beck* teaches is that by definition the omission of an instruction that enhances the risk of a death sentence cannot be harmless.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 1, 1985.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

UNITED STATES OF AMERICA ex rel. FRED REED,
Petitioner-Appellee,

No. 83-2972 vs.

MICHAEL LANE and JAMES GREER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 3622—**Milton I. Shadur**, *Judge.*

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by appellee Fred Reed and appellants Michael Lane and James Greer, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.